Caterpillar, Inc. *and* International Union United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 786. Cases 33–CA–10158, 33–CA–10159, 33–CA–10160, and 33–CA–10161

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 23, 1994, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Parties filed cross-exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.[1] The Respondent, the Charging Parties, and the General Counsel all filed answering briefs and reply briefs. The Charging Parties filed a motion for an expedited decision, and the Respondent filed a response to that motion.

On February 17, 1995, the Respondent attempted to file cross-exceptions, which were rejected by the Board's Deputy Executive Secretary by letter of February 21, 1995, on the ground that Section 102.46(e) of the Board's Rules does not permit the filing of cross-exceptions by a party that has already filed exceptions. The Respondent's appeal of this action to the Board was denied on March 9, 1995. Inasmuch as the Board has rejected the Respondent's cross-exceptions, the General Counsel's motion to strike them is denied as moot.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) by prohibiting its employees from displaying various union slogans including ''Permanently Replace Fites'' and any derivative thereof, and that the Respondent violated Section 8(a)(3) by enforcing this rule.[4] In agreeing with the judge that the ''Permanently Replace Fites'' message, as it was utilized at the York, Pennsylvania facility, was protected by Section 7 of the Act, we specifically rely on three rationales.

First, for the reasons stated by the judge, we agree with him that the slogan was a response to the Respondent's stated policy of using permanent replacements, rather than an attempt to cause the removal of Donald Fites as the Respondent's chief executive officer.[5]

[1] The above-captioned cases had been consolidated with approximately 70 other unfair labor practice cases. The Respondent has excepted, inter alia, to the judge's decision, after the close of the hearing, to sever these four cases for briefing and decision. We find that the decision to sever is within the discretion of the judge. See Sec. 102.35(h) of the Board's Rules. There has been no showing of an abuse of that discretion. On the contrary, we commend the judge for his systematic and orderly approach to resolving in a timely fashion a huge number of complex cases.

The Respondent contends that the General Counsel's and the Charging Parties' exceptions do not conform to Sec. 102.46 of the Board's Rules. The General Counsel contends that the Respondent's exceptions, particularly as to the severance of these cases, fail to conform to the Board's Rules. Although the parties' exceptions are not in precise conformity with Sec. 102.46, we find that they are in substantial compliance with those requirements.

The Respondent and the Charging Parties have also excepted to the judge's discussion of certain ''general'' facts in sec. III,A,1 of his decision. We find it unnecessary to pass on the accuracy of that discussion because it was offered for background only and is not a necessary part of the judge's decision.

[2] The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform it to the violations he found and the additional violations found here. We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The General Counsel has excepted to the judge's failure to provide a broad cease-and-desist Order. We find that a narrow cease-and-desist Order is appropriate because the Respondent has not been shown in these particular cases to have a proclivity to violate the Act or a general disregard for employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] On November 24, 1992, employees wore ''Permanently Replace Fites'' T-shirts, that also communicated in small lettering that the General Counsel had issued an unfair labor practice complaint based on Kenneth Myers' discharge for refusing to remove this slogan from his clothing. Contrary to the judge, we agree with the Charging Parties that the Act protects the right of employees to communicate this additional message. Our disagreement with the judge on this point, however, does not require any modification of the judge's unfair labor practice findings because the judge properly found that the Respondent violated the Act by prohibiting the employees from wearing the T-shirts in question.

[5] The Respondent argues that the slogan cannot be so interpreted as a double entendre because it was not Fites who signed the March 31, 1992 letter stating the Respondent's intention to permanently replace striking employees who did not return to work by April 6. Although the Respondent is correct that the letter was signed not by Fites but by Jerry Brust, the Respondent's director of corporate labor relations, Brust testified that Fites is the Respondent's chairman and chief executive officer, and that Fites gave ''final approval'' to the decision to permanently replace striking employees if they did not return to work by April 6. Therefore, the record supports the judge's key findings that Fites ''is the personification of the company'' and that the ''Permanently Replace Fites'' message expressed the em-

Second, even if the employees were attempting to cause the removal of the chief executive officer, their conduct was still protected under the four-part test of *NLRB v. Oakes Machine Corp*., 897 F.2d 84 (2d Cir. 1990), which the judge properly applied.

Third, again assuming that the employees were seeking to remove Fites from his position, under established Board precedent, such activity is protected when ''it is evident that [the supervisor's conduct] had an impact on employee working conditions.''[6] The employees at York in adopting the ''Permanently Replace Fites'' slogan were manifesting their support for their fellow employees on strike at other Caterpillar plants and their opposition to the decision approved by Fites to permanently replace those striking employees if they did not return to work. The record shows that as a result of that decision, numerous employees abandoned the strike and returned to work. Clearly, therefore, Fites' decision had a substantial impact on the employees' terms and conditions of employment.

In addition, as discussed in section 3 infra, during the instant labor dispute Fites appeared on the shop floor of the York plant and told a rank-and-file employee that if he did not ''get this Union to sit down and accept this contract, we're going to close the York plant.'' This incident shows that Fites had direct contact with employees and played a major role in fixing their employment conditions. Indeed, it is difficult to conceive of a working condition of greater importance to employees than the retention of their very jobs.

Our dissenting colleague concedes that ''the 'Permanently Replace Fites' slogan was, in part, a [protected] protest against the Respondent's stated policy of using permanent replacements.'' Our dissenting colleague also finds, however, that the employees had a second purpose, ''the ouster of Fites,'' which he would find to be unprotected under the *Oakes* test. There are several flaws in the dissent's analysis.

First, contrary to our dissenting colleague, we find no sufficient basis in the record for reversing the judge's factual finding that the employees were not actually attempting to force Fites' removal. The judge's finding is not only in accord with the evidence, but with common sense. No reasonable employee could possibly believe that the ouster of the Respondent's chief executive officer could be accomplished by displaying the message ''Permanently Replace Fites'' on the shop floor while carrying out his daily work tasks. It is far more sensible to find, as the judge did, that ''[i]t is not so much that employees literally wanted Fites replaced as they objected to the Respondent's stated policy of using permanent replacements, a policy they reasonably associated with Fites.''

Second, even assuming arguendo that our dissenting colleague is correct that the employees were seeking the removal of Fites, the dissent misapplies the *Oakes* test and, consequently, reaches the erroneous conclusion that the employee conduct was not protected. Like *Oakes*, this case has exceptional facts showing that a high-level manager directly affected working conditions and had direct contact with employees. As discussed above, Fites not only gave final approval to the decision to permanently replace striking employees, but also Fites personally threatened a bargaining unit employee with closure of the York plant if he did not ''get this Union to sit down and accept this contract.'' Although the dissent euphemistically refers to Fites' unlawful threat of plant closure as a ''discuss[ion] [of] the labor dispute,'' the fact remains that this encounter between a rank-and-file employee and the Respondent's chief executive officer graphically illustrates just how unusual the facts of this case are and why Fites was within the realm of proper employee concern.

Further, our dissenting colleague errs in finding that the employees' display of the ''Permanently Replace Fites'' message on the plant floor was not a ''reasonable'' means of protest within the meaning of *Oakes*. Our dissenting colleague cites no authority in support of this proposition, and we know of none.[7] To the contrary, in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 fn. 7 (1945), the Supreme Court quoted with approval from the underlying Board decision as follows: ''[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity.''

Third, the cases cited by our dissenting colleague are clearly distinguishable. In those cases, employees were protesting management policies that did not directly affect them as employees.[8] Thus, the Board in *Lutheran Social Services*, supra, concluded that

ployees' objection to a policy of using permanent replacements that the employees ''reasonably associated with Fites.''

[6] *Hoytuck Corp*., 285 NLRB 904 fn. 3 (1987). Like Chairman Gould, Member Browning finds that the employees' activity here was protected under existing precedent. In view of the important issues that the Chairman raises in his concurrence, however, Member Browning believes that it would be appropriate for the Board at some future point to reexamine the continued validity of *Hoytuck*.

[7] As the First Circuit explained in *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 9 (1st Cir. 1979), courts generally have found that ''the writing of letters'' and ''the simple voicing of complaints'' are reasonable means of protest, while strikes are not. The means employed by employees here is much closer to the former than the latter.

[8] *Lutheran Social Services of Minnesota*, 250 NLRB 35, 41 (1980) (employees protested program decisions by management and the perceived lack of competency of management); *New York Chinatown Senior Citizens Coalition Center*, 239 NLRB 614 (1978) (employees criticized executive for his conceit and pride, belittled him for teaching a course, and conveyed belief executive was not running center so as to achieve the social objective for which public funds were being spent); *Abilities & Goodwill*, supra (strikers refused to return to work until the employer rehired former executive who had been fired after accusing the executive director of mismanagement, lack of ability, and dishonest practices).

''[p]rotest against the quality of the product . . . and of those vested with the ultimate authority to establish basic managerial guidelines and philosophy is not activity which could improve the employees' 'lot as employees.'''[9] By contrast, the decision here to permanently replace striking employees clearly had an immediate and direct effect on the employees' ''lot as employees.''

Fourth, the dissent's legal analysis is incomplete and does not support its ultimate conclusion that the Respondent was free to prohibit employees from displaying the ''Permanently Replace Fites'' message. This is so because the dissent finds that the employees acted in support of two purposes: a purpose protected by Section 7 (protesting Respondent's policy of using permanent replacement) and a purpose not protected by Section 7 (seeking the removal of Fites). Given these findings, the dissent never satisfactorily explains why the unprotected purpose necessarily ''trumps'' the protected purpose. As a result, the dissent is inconsistent with the settled principle that ''not every impropriety committed during [the course of Section 7] activity places the employee beyond the protective shield of the Act.'' *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

Citing *Thor Power Tool*, the Seventh Circuit stated in the subsequent case of *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976), that it ''is committed to the standard for determining whether specified conduct is removed from the protections of the Act as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character as to render the employee unfit for further service.'' If our dissenting colleague applied this test, we believe that he should conclude that the aspect of the communication that he would find to be unprotected was not so egregious as to warrant denying the York employees their statutory right to express solidarity with their fellow employees on strike at other Caterpillar plants.

Our dissenting colleague attempts to fill the void in his analysis by finding that ''special circumstances'' justified the prohibition on the ''Permanently Replace Fites'' message. Contrary to our dissenting colleague, we agree with the judge that the Respondent has not met its burden of demonstrating ''special circumstances'' that outweighed the employees' Section 7 rights.

It is firmly established that ''substantial evidence of special circumstances, such as interference with production or safety, is required before an employer may prohibit the wearing of union insignia, and the burden of establishing those circumstances rest[s] on the employer. *Government Employees*, 278 NLRB 378, 385 (1986). It is also well settled that ''general, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.''' *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990).

The full Board recently applied these principles in a case similar to the one at bar involving an employer's attempt to ban union insignia encouraging solidarity with respect to the employer's bargaining tactics. *Escanaba Paper Co.*, 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996). In *Escanaba*, the employer argued that the employees' messages contributed to a hostile atmosphere in the plant between management and employees; that vandalism in the plant was attributable to the employees' slogans; and that a ban was needed to discourage labor unrest, maintain discipline, and prevent the public from receiving a negative impression of the employer. The Board rejected the employer's defense on the ground that it was not supported by the record. Characterizing the employer's evidentiary showing as consisting generally of ''unsupported subjective impressions,'' the Board concluded that as a practical matter the employer ''introduced no evidence'' that the union insignia ''hindered production, caused disciplinary problems in the plant, or had any other consequences that would constitute special circumstances under settled precedent.'' 314 NLRB at 734–735.

Contrary to our dissenting colleague, we agree with the judge that the Respondent here, like the employer in *Escanaba*, failed to show the existence of special circumstances. Our dissenting colleague's conclusory assertion that the employees' message ''could not help but promote disorder, undermine production, and foster a lack of discipline'' is no substitute for evidence. It must be remembered that employees' statutory rights are at stake here, and we are unwilling to sacrifice them on the basis of nothing more than sheer speculation. To the extent that our dissenting colleague may be arguing that the ''Permanently Replace Fites'' message is inherently disruptive, we would point out that the court of appeals in *Escanaba* rejected a similar contention. In that case, the court said that certain employee slogans ''certainly do show discontent, even anger, arising out of the . . . contract negotiations.'' The court held, however, that the message remained protected because employees were not urged ''to stop doing their jobs or to refuse to listen to their supervisors.'' 73 F.3d at 80. The same is true of the ''Permanently Replace Fites'' message. In sum, the dissent can point to nothing more than its own ''unsupported subjective impressions.'' *Escanaba*, supra. Thus, there is nothing in the dissent warranting reversal of the

[9] *Lutheran Social Services*, supra at 42, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

judge's finding that the Respondent has failed to sustain its defense of special circumstances.[10]

Accordingly, for all these reasons, we agree with the judge that the employees engaged in protected activity when they displayed the ''Permanently Replace Fites'' slogan.

2. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by disciplining Kenneth Myers for circulating a get-well card on company time, a practice which the Respondent admitted had been allowed in the past. Myers was an open union advocate and at that time was a union steward. He was also a longtime employee at York. In April 1992,[11] Myers initiated the wearing of the ''Permanently Replace Fites'' slogan at York, and he had been discharged (although quickly reinstated) for refusing to remove it. Even though the judge did not explicitly analyze the greeting card incident with reference to *Wright Line*,[12] his findings are consistent with that decision. The judge essentially found a prima facie case of discriminatory conduct and considered and rejected as pretextual the Respondent's proffered defenses to the allegations that its actions were unlawful. See *T&J Trucking Co*., 316 NLRB 771 (1995); *Garney Morris, Inc*., 313 NLRB 101, 102 (1993); and *Limestone Apparel Corp*., 255 NLRB 722 (1981).[13]

3. The judge credited the testimony of Wayne Snedegar that during an August 14 tour of the York facility, Donald Fites said, ''Wayne if you don't get this union to sit down and accept this contract we're going to close the York plant.''[14] The judge, however, dismissed the allegation that the Respondent thereby made an unlawful threat in violation of Section 8(a)(1), relying on the Respondent's longstanding position that the York facility would be closed unless cost savings were effected. We disagree.

Under the standard enunciated by the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), an employer's prediction of dire economic effects stemming from unionization must not contain ''any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him.'' Id. at 618. If such a prediction is made, it must be supported ''on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'' Id.

Contrary to the judge, we find that Fites' statement went far beyond reiterating the Respondent's prior position that cost savings were needed to keep the York plant open. In this instance, Fites explicitly linked plant closure to the Union's failure ''to sit down and accept this contract.'' Under the *Gissel* test, Fites' statement is an unlawful threat, rather than a permissible prediction, because the Respondent has failed to establish that acceptance of its last contract offer was the only means of avoiding plant closure. Not only did Fites' statement lack an objective basis, but also his description of the Respondent's offer as being advanced on a take-it-or-leave-it basis represented the antithesis of good-faith bargaining. Under the scenario Fites outlined, the collective-bargaining process had no role to play in reaching the cost savings the Respondent desired. Accordingly, we conclude that the statement is a threat of reprisal in violation of Section 8(a)(1).

4. In August, Supervisor Al Little asked Gary Shearer, an employee under his supervision and a union steward, if Shearer had gone to a particular union rally and if Shearer had said anything. When Shearer replied

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[10] Our dissenting colleague errs when he says that it is ''significant'' that the Respondent did not seek to ban all prounion messages. Under Board law, it is irrelevant that the Respondent allowed employees to wear other union insignia that it deemed acceptable. *Holladay Park Hospital*, 262 NLRB 278, 279 (1982).

We also disagree with our dissenting colleague's reliance on *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956); and *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983). See our discussion of these cases in *Escanaba Paper*, 314 NLRB at 733–734 fns. 7 and 10.

Finally, *Southwestern Bell Telephone Co*., 200 NLRB 667 (1972), is clearly distinguishable, as it involved a slogan that was found to be obscene.

[11] All dates are in 1992 unless otherwise noted.

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[13] In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by its cycle timing of Myers, we find that the General Counsel established a prima facie case but that, unlike the greeting card incident, the Respondent satisfied its burden under *Wright Line* by establishing that it would have taken the same action even in the absence of Myers' protected activity.

We adopt the judge's dismissal of the allegation that Supervisor Wayne Glass threatened Myers on June 12. However, in so doing we find it unnecessary to rely on the judge's statement that ''by this time Myers' productivity had been questionable, a fact which even Myers admitted.''

[14] In deciding to credit Snedegar's testimony concerning his conversation with Fites, the judge correctly observed that the Respondent did not call Fites and others in the area at the time the disputed conversation took place to testify to the content of the conversation between Fites and Snedegar. Rejecting the testimony of Company Manager Ed Hubbard, who was the only other person to testify with respect to this incident, the judge concluded that the conversation between Fites and Snedegar concerning plant closure ''did . . . happen,'' and the judge specifically stated that ''Snedegar was credible as to this event.''

We recognize that the judge proceeded to infer that it was ''doubt[ful]'' that Fites ''uttered the words in precisely the way Snedegar remembered'' because on prior occasions the Respondent had advised employees that cost savings were necessary to keep the York plant open. The judge, however, did not make a finding as to precisely what words were spoken in the Snedegar—Fites conversation. Given the judge's crediting of Snedegar's testimony, and the absence of any other credible testimony concerning the contents of the conversation, we conclude that the judge's inference that Fites' words were not ''precisely the way Snedegar remembered'' is pure speculation. Therefore, we rely instead on Snedegar's credited testimony in determining whether Fites unlawfully threatened to close the plant.

that he had gone to the rally but had not said anything, Little responded, ''[Y]ou screwed up. You should have spoken out against the union and put them down.'' The judge termed this exchange ''shop talk'' and dismissed the allegation that it constituted an unlawful interrogation. We disagree.

The Board has found the interrogation of open union adherents to be unlawful when accompanied by other coercive conduct. E.g., *Christie Electric Corp*., 284 NLRB 740, 741 (1987); *Clark Equipment Co*., 278 NLRB 498, 502 (1986). Here, Little's interrogation of Shearer is colored by the the implied threat that immediately followed: Shearer had ''screwed up'' when he failed to ''put'' the Union ''down.''[15] In these circumstances, we find that the interrogation was coercive and violated Section 8(a)(1).

5. The judge dismissed the allegation that the Respondent, through Supervisor Al Little, discouraged employees from filing grievances and threatened employees with plant closure. We disagree.

In November, Shearer had received 20 identical grievances from employees protesting the Respondent's actions relating to union committeemen. When Little realized that the grievances were identical, he became angry and told Shearer that if the union leadership did not ''wake the fuck up, they will close this motherfucking place down.'' Little admitted that he became upset because the grievances were all the same and asked Shearer why.

The judge found that, although employees have the right to file grievances, and even multiple grievances, ''there can be little question that the mass filing of grievances here was some kind of a tactic unrelated to the substance of the grievances.'' The judge concluded that Little's statement did not constitute a violation of the Act, because it was a ''genuine expression of concern by one who would be adversely affected should the plant close.''

As the judge acknowledged, the Act protects the right of employees to file grievances, even multiple grievances. We find, however, the judge's conclusion ''that the mass filing of grievances here was based on some kind of tactic unrelated to the substance of the grievances'' to be pure speculation and unsupported by any record evidence. We therefore find that Little's statement to Shearer constituted an unlawful threat of plant closure that would reasonably tend to discourage employees from filing grievances and was a violation of Section 8(a)(1).[16]

6. The judge found, and we agree, that the Respondent violated Section 8(a)(1) when Little, in announcing stricter enforcement of work rules, told employees who had worn a ''Permanently Replace Fites'' T-shirt on November 24 that they had already received a warning and that, therefore, any breach of the rules he announced would subject them to suspension and, for a second offense, discharge. Contrary to the judge, however, we also find that the Respondent violated Section 8(a)(5) by announcing that existing work rules would be enforced more strictly, without first bargaining with the Union.

It is, as the judge found, undisputed that in late December and early January, Little spoke individually to the employees in his department and told them that henceforth he expected more strict compliance with the 15-minute midmorning and midafternoon breaks and the 20-minute lunch period.[17] Little also told them that they would have to work to the end of their shift, would receive only 2-1/2 to 3 minutes to wash up, and that they would be responsible for telling their visitors not on company business to leave the department. Little testified that these guidelines had been the policy all along but that employees had not been adhering to the guidelines.

Even assuming, as Little testified, that the rules at issue had always been in existence, the Respondent's unilateral change in enforcement policy is still a violation of Section 8(a)(5) and (1). Little's own testimony establishes that the new compliance policy was a departure from Little's prior practice of lax enforcement of the rules, which had prevailed and had become an established term and condition of employment. Thus, the more stringent enforcement of the rules constituted a change in the employees' terms and conditions of employment over which the Respondent had an obligation to bargain. *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), enfd. 939 F.2d 361 (6th Cir. 1991). Accordingly, we find that by unilaterally announcing stricter enforcement of work rules, the Respondent violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing or displaying union insignia, including but not limited to the ''Permanently Replace Fites'' slogan with all its derivations and spellings, by requiring employees to obtain prior management approval of union insignia, by re-

[15] See *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 930 (5th Cir. 1993) (supervisor unlawfully threatened employee with reprisals by telling him that the company would ''look down'' on him and everyone else that ''went union'').

[16] The General Counsel and the Charging Parties have excepted to the judge's failure to make any findings on the complaint allegations that in November the Respondent discouraged the filing of grievances by Supervisor Al Little's interference with Shearer's investigation of employee Richard Geier's grievance and by Little's stating to employees that it would be futile to bring grievances to his attention. We find it unnecessary to pass on these allegations, because the violations, if found, would be cumulative.

[17] Although Little afforded the employees an opportunity to have a union representative present if they chose, no negotiations with the Union took place before Little announced the stricter enforcement policy.

moving signs containing union insignia from employees' tool boxes, and by singling out employees who had worn ''Permanently Replace Fites'' T-shirts as being first offenders.

2. The Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge and plant closure, by coercively interrogating an employee about his union activity, by suggesting that an employee seek other employment because of his protected concerted activity, and by discouraging the filing of grievances.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Kenneth Myers for wearing a sign which read, ''Permanently Replace Fites'' and, after his reinstatement, by discriminatorily disciplining him for circulating a greeting card.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Edward Benedict, William Burns, Harry Burrows, Donald Coddington, Robert Coppenheaver, Shawn Kline, Barry Koicuba, Robert Lloyd, Kenneth Myers, Terry Orndorff, Dennis Rohrbaugh, John Samac, Rosella Sentz, John Solovey, George Swemley, Marvin Weyant, Robert Whiteford, Ted Williams, Robert Hilderbrand Jr., Wilson Hostetter, Thomas Heath, Dennis Angle, and Wayne Snedegar for their union and protected concerted activity.

5. The Respondent violated Section 8(a)(5) and (1) by unilaterally announcing stricter enforcement of work rules.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Caterpillar, Inc., York, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees because they engage in union or other concerted activity protected by Section 7 of the Act.

(b) Prohibiting employees from wearing insignia, or displaying messages on flyers and posters, relating to their labor dispute including, but not limited to, buttons or T-shirts which bear the message ''Permanently Replace Fites'' or any derivative thereof.

(c) Discriminatorily enforcing rules concerning solicitation.

(d) Suggesting to an employee that he seek employment elsewhere because of his protected concerted activity.

(e) Deeming the wearing of a ''Permanently Replace Fites'' T-shirt to be a first offense within the discipline system.

(f) Coercively interrogating employees about their union activities.

(g) Threatening plant closure if the Union does not agree to the Respondent's contract proposal.

(h) Discouraging the filing of grievances, including the filing of mass grievances.

(i) Unilaterally announcing stricter enforcement of work rules.

(j) Requiring prior management approval of union insignia to be worn or displayed.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dennis Rohrbaugh full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dennis Rohrbaugh whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Make whole Edward Benedict, William Burns, Harry Burrows, Donald Coddington, Robert Coppenheaver, Shawn Kline, Barry Koicuba, Robert Lloyd, Kenneth Myers, Terry Orndorff, Dennis Rohrbaugh, John Samac, Rosella Sentz, John Solovey, George Swemley, Marvin Weyant, Robert Whiteford, Ted Williams, Robert Hilderbrand Jr., Wilson Hostetter, Thomas Heath, Dennis Angle, and Wayne Snedegar for any loss of wages or other benefits they may have suffered as a result of their unlawful suspensions, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to employees' unlawful discipline, discharge, or suspension, and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline, discharge, or suspension will not be used against them in any way.

(e) Within 14 days from the date of this Order, remove from its files any reference to employees' commission of a ''first offense'' for having worn a ''Permanently Replace Fites'' T-shirt, and within 3 days thereafter notify the employees in writing that this has been done and that the ''first offense'' will not be used against them in any way.

(f) Rescind its unlawful ''first offense'' rule concerning displays of the ''Permanently Replace Fites'' message or other protected union messages and any

''second offense'' determination which results from that rule.

(g) Rescind the stricter enforcement policy concerning the work rules for unit employees.

(h) Rescind the rule requiring employees to obtain prior management approval of union insignia.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility at York, Pennsylvania, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2, 1992.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I am of the view that the employees were engaged in protected activity under current Board law when they displayed the ''Permanently Replace Fites'' slogan. I write separately only to express my dissatisfaction with Board and court precedent with respect to whether employee activity that seeks to influence management policy is protected. The level of managerial policy or hierarchy protested by the union or employees should have little if anything to do with whether such employee activity is protected. Quite obviously, the level at which managerial representatives are involved in employment conditions will vary from company to company. While I am of the view that concerted activity for the purpose of influencing management policy, which is unrelated to employment conditions, is not protected under the Act, the fact of the matter is that the presence or absence of a particular corporate hierarchical structure or internal organization does not provide the appropriate answer to the question of whether employee activity is protected under Section 7 of the Act.

Here, Chief Executive Officer (CEO) Fites took a particularly active role in setting management policy relating to employment conditions. It does not matter, as Member Cohen's dissent states, whether this was done at the ''highest level''—what matters is that it addresses employment conditions. As Member Cohen concedes in his dissent, the employees' protest was, in part, against the policy of using permanent replacements, and the employees ''actually sought the ouster of Fites in hopes of securing a management hierarchy more favorable to Union and employee positions.'' Such a protest should be held to be protected activity.

I agree with the court of appeals in *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990), that it is important that the protest originate with employees rather than supervisors, that is, that the protest is ''an *employee*, rather than a supervisor's protest.'' *NLRB v. Puerto Rico Sheraton Hotel*, 651 F.2d 49, 52 (1st Cir. 1981). (Emphasis in original.) At the same time, the question of whether the supervisor in question is directly involved with employment conditions is irrelevant. The appropriate inquiry is whether the protest focuses upon management conduct or expressions of policy which relate to employment conditions—not the precise job title or classification of the management official and whether such an individual has responsibility for employment, labor, personnel, or human resources.

The cases rising under Section 7 have drawn sustenance from the First Amendment decisions of the Supreme Court in *New York Times v. Sullivan*[1] and its progeny, all of which promote wide open and robust speech as part of good public policy. While one hopes for cooperation between labor and management which, in established relationships and otherwise, promotes a reasoned dialogue, the fact of the matter is that much of the discussion between unions and management is rough and tumble. This is the reality of the employment relationship.

The Union's demand that Fites be dismissed is part of this process. Viewed in this context, while reasonable men and women can disagree about a position taken by the Union in the instant dispute, and the Board and the courts would no doubt place it beyond the scope of mandatory subjects of bargaining under the Act,[2] the fact is that the Board should not relegate

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] 376 U.S. 254 (1964).

[2] Cf. *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

such conduct to unprotected status simply by characterizing it, as does the dissent, as ''not reasonable.''

Of course, as the Board said in *Southwestern Bell*, 200 NLRB 667 (1972), legitimate campaign propaganda may be ''so disrespectful'' of management that it impairs ''the maintenance of discipline.'' I would agree that some speech can go beyond the bounds of propriety in the workplace. But given the realities of the employment relationship alluded to above, I am of the view that the Supreme Court's approach to free speech in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is applicable to employee speech under the Act, i.e., that the speech in question is protected unless the advocacy involved disrupts production by virtue of the fact that the advocate is ''inciting or producing imminent lawless action and is likely to incite or produce such action.'' Id. at 447.

With regard to a protest about management officials at any level, the test should be whether the protest is designed to produce changes in management hierarchy unrelated to employment conditions or to produce changes in working conditions. If the test is concerned with both matters with respect to low-level supervisors, as our opinion makes clear, the Section 7 aspect of it predominates. While rank may have its privileges throughout the world, there is no basis for a distinction between low and high level management officials under the National Labor Relations Act insofar as the issues presented here are concerned. My view is that the protest calling for the termination of the CEO is itself protected under the statute as well, where one of its purposes involves the employees' working conditions.

The fact of the matter is that it is often impossible to distinguish protests about management hierarchy and protests about employment conditions themselves. The National Labor Relations Act, which contains a policy commitment to the promotion and practice of the collective-bargaining process as well as freedom of association through concerted activity, contains, as its central element, the right of all employees to protest and to speak up so as to alter and affect their employment conditions. It would be an anomalous and cramped interpretation of the statute which would hold that employee protests of the kind here are unprotected, given the prominence of the permanent strike replacement issue in the relationship between the parties and the outspokenness of the CEO and other management officials on this issue.

MEMBER COHEN, dissenting in part.

I cannot agree that the employees' efforts, promoted by the Union, to oust the Respondent's CEO, Donald Fites, were protected by the Act. I would therefore dismiss those complaint allegations based on the Respondent's prohibitions against the in-plant use of the ''Permanently Replace Fites'' slogan.[1]

I agree that the ''Permanently Replace Fites'' slogan was, in part, a protest against the Respondent's stated policy of using permanent replacements. But it is also clear that employees actually sought the ouster of Fites in hopes of securing a management hierarchy more favorable to union and employee positions.[2]

I would adhere to prior Board and court holdings that recognize, in deciding whether employee activity is protected, a critical distinction between employee protests regarding a front-line supervisor and similar protests over the highest levels of management.[3] As succinctly set forth in *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980):

> [T]here appears to be a tacit assumption that employee efforts to affect the ultimate direction and managerial policies are beyond the scope of [the mutual aid and protection clause]. The distinction seems to be implicit in the line of cases which holds that protests against the appointment or termination of ''low level'' supervisors may be protected when directly related to employees' conditions of employment [citations omitted] while similar activity with regard to ''top management'' of the employer is not safeguarded. [Citations omitted.]

Here, the judge and my colleagues apply *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990), to determine that the Respondent's employees were privileged to seek Fites' removal. I disagree with their analysis.

The *Oakes* court, in deciding when activity directed at replacing a supervisor is protected, reviewed whether the ''identity of the supervisor is directly related to

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[1] As fully recounted by the judge, the employees used this slogan on T-shirts, tools, and other items.

[2] Despite the judge's reluctance to find that the Union and the employees in fact sought the ouster of Fites, this finding seems compelled by the facts. In April 1992, employees with placards containing the ''Permanently Replace Fites'' message appeared at a union demonstration at the Respondent's annual shareholders meeting. Subsequently, in 1993, the Union and employees escalated the theme that Fites must go, including petitioning shareholders to remove Fites. Thus, the Union's and employees' messages on their face, and the actions taken, fully support the finding that Fites' removal was actually sought.

Contrary to my colleagues, the object of the union and employee efforts surely cannot be determined based on whether the efforts faced likely success. I fail to see any ''common sense'' in reasoning that the employees calling for Fites' ouster did not seek Fites' ouster because they may have seen little chance of accomplishing their goal. Further, by appealing to the Respondent's shareholders, the Union and the employees underscored that they were serious about seeking Fites' removal.

[3] See, e.g., *New York Chinatown Senior Citizens Coalition Center*, 239 NLRB 614 fn. 1 (1978); *NLRB v. Abilities & Goodwill, Inc.*, 612 F.2d 6 (1st Cir. 1979).

terms and conditions of employment.'' The *Oakes* court stated further:

> Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances, including (1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly related to terms and conditions of employment; and (4) the reasonableness of the means of protest.

Using the court's analysis, I find the employee effort to oust Fites to be unprotected.

In regard to the court's ''dealt directly'' inquiry,[4] I cannot find that Fites ''dealt directly'' with employees—as that term is used in *Oakes*. Fites, as CEO of a national corporation, made decisions regarding the Respondent's employment practices and collective-bargaining posture. Those actions did not constitute direct dealing with the employees. To hold otherwise would mean that any high management official making corporate decisions affecting employee terms and conditions of employment—activity that likely includes most CEOs—would be deemed to have ''dealt directly'' with employees. This is not what the *Oakes* court contemplated. Further, Fites' touring a plant and having occasion to discuss the labor dispute with rank-and-file employees falls far short of the direct dealing contemplated in *Oakes*.[5]

Further, the identity of Fites is not directly related to the employees' terms and conditions of employment. The Respondent made a corporate decision to permanently replace strikers. Though Fites may have advocated and supported the Respondent's position, there is no showing that Fites was ''personally'' responsible for the management decision—as that term is used in *Oakes*.[6] A major policy decision by a national corporation and its CEO is clearly insulated from attack as a ''personal'' decision of a CEO. My colleagues' view seemingly makes any CEO who makes decisions affecting employees fair game for an ouster campaign.[7]

Finally, the employees' insistence on taking their campaign to the work floor was not reasonable. A workplace effort to remove the highest level of management is akin to a workplace insistence that the employees control decisions that others are charged with making. Thus, the employee actions in this case could not help but cause unnecessary workplace friction.[8]

My colleagues suggest that because I find that the union/employee message regarding the removal of Fites was in part protected—because it protested the Respondent's permanent replacement policy—I must conclude that the message could not be banned. But this is not my conclusion. Like my colleagues, I take guidance from *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Employees have the right to display union related materials at work but the employee right must be balanced against the employer right to maintain production and discipline. Thus, an employer may demonstrate that ''special circumstances'' exist that justify its ban on union messages.

Here, the Respondent showed special circumstances. As noted, the slogan in issue included an unprotected object—the removal of CEO Fites. The message did not merely seek to promote union causes and encourage solidarity. Rather, it included a stark defiance of the Respondent's authority to make managerial decisions. Continuing plant floor calls for the removal of Respondent's CEO could not help but promote disorder, undermine production, and foster a lack of discipline on the plant floor during worktime.[9]

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[4] I question the judge's finding that the ''Permanently Replace Fites'' theme began with individual employees rather than the Union. Nonetheless, the *Oakes* court's concern was whether the protest began with employees *as opposed to* other supervisors. As the protests here did not originate from supervisors and as the Union is the employees' agent, I will assume arguendo that the protest began with employees.

[5] Try as they might, my colleagues fail to persuade that Fites dealt directly with employees. Fites' role here did not constitute ''exceptional'' or ''unusual'' circumstances. To the contrary, CEO Fites' role was one of making the sort of high-level managerial decisions regarding the ultimate direction of the company that CEOs are typically charged with making. Further, the Union and the employees did not seek Fites' removal because of any daily dealings Fites had with employees or because he violated Sec. 8(a)(1) on one occasion on the York plant floor. They sought Fites' removal because of his role in setting management policy at the highest level. Although a CEO's decision making may ultimately affect employees in their ''lot as employees,'' employees do not have a protected right to seek removal of a CEO because of his role in that decision making.

[6] Contrast the circumstances in *Oakes*. There, the manager in issue made decisions—having employees work on his personal projects rather than normal work—that affected the amount of employee bonuses from the respondent's parent company.

[7] My colleagues note that it was not Fites who signed the letter announcing the Respondent's intention to permanently replace strikers. They note, however, that Fites gave ''final approval'' to the Respondent's position. In my view, this does not make Fites ''personally'' responsible for the Respondent's policies.

[8] Unlike my colleagues, I see little similarity between this case and those involving ''the writing of letters'' or ''the simple voicing of complaints.'' As review of the cases cited by the *Abilities & Goodwill* court reveals, letter writing does not generally occur on the plant floor during worktime. Voicing complaints typically involves requesting a meeting with management to air grievances. Here, in sharp contrast, the Union and its supporters sought to use unceasing plant floor/ worktime messages calling for the removal of the Respondent's CEO. The union/employee slogan here could only serve as a constant irritant to management and undermine production and discipline. The employee conduct here was far from legitimate letter writing or airing grievances.

[9] See *Southwestern Bell*, 200 NLRB 667 (1972), where the Board upheld an employer's right to ban the use of a slogan that ''Ma Bell is a Cheap Mother.'' In that case, the Board, id. at 670, recognized

Significantly, the Respondent did *not* seek to ban all messages supporting union positions and promoting solidarity.[10] To the contrary, employees daily utilized innumerable slogans promoting their cause on the plant floor without challenge by the Respondent. This is not a case where an employer sought to ban all union messages on the plant floor. Rather, the issue is whether Respondent could ban a particular message for a particular substantial and legitmate business reason.[11]

NLRB v. Thor Power Tool, 351 F.2d 584 (7th Cir. 1965); and *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976), cited by my colleagues, do not control here. Those cases arose in the context of offensive employee conduct at a grievance meeting. In that context, considerable leeway is allowed—even regarding offensive employee remarks directed to management—so that there is a free and full discussion of grievances. During a grievance meeting, the legitimate management need to maintain production and discipline is not a concern that weighs heavily in the balance.[12] Also, in the grievance context, as reflected by the cases cited, the employee conduct consisted of a single remark or isolated offensive remarks. Here, the context is one of continuing employee conduct on the plant floor during worktime and employee attempts to use a slogan as a constant workplace challenge to management, and not just management policies. In this context, cases like *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956); and *Midstate Telephone v. NLRB*, 706 F.2d 338 (2d Cir. 1983), are closer to the instant situation. In the former case, the court upheld an employer's right to ban buttons with the slogan ''Don't be a Scab'' because such button could have a ''disruptive'' influence on work and discipline. In the latter case, the court, with similar reasoning, upheld an employer's right to ban T-shirts with the slogan ''I SURVIVED THE MIDSTATE STRIKE OF 1971–75–79.''

Here, the Respondent justified its prohibition of the slogans calling for the removal of its CEO. Employees were permitted wide latitude to promote their causes on the plant floor. The Respondent's prohibition of the employees' plant floor efforts to remove its CEO reflected a measured and reasonable effort to maintain discipline and some minimal level of harmonious employer-employee relations on the plant floor. Therefore, in my view, the Respondent's prohibition did not violate the Act.

The extension of *Oakes* to find the employee protests here protected is unwise and unwarranted. The majority's decision suggests that employee efforts to change and remove the highest levels of management are protected—if that management has made decisions affecting employees' terms and conditions of employment. By this reasoning, virtually all campaigns to remove high management would be protected. This was not what the *Oakes* court intended.[13] The *Oakes* court emphasized:

> Employee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the sphere of legitimate employee interest.

My colleagues' decision effectively obliterates the distinctions between employee protests over low-level and high-level management as set forth in cases like

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that an employer may prohibit employee conduct that ''exceeds the bounds of legitimate campaign propaganda or is so disrespectful of the employer as seriously to impair the maintenance of discipline.'' Citing *NLRB v. Baby Bell, Inc*., 219 F.2d 796, 798 (5th Cir. 1955).

[10] Contrary to my colleagues, *Holladay Park Hospital*, 262 NLRB 278 (1982), does not teach that, in this context, it is always irrelevant that an employer permits employees to wear substantial prounion materials. In *Holladay*, the Board found that an employer enforced a dress code in a discriminatory manner by prohibiting only the wearing of particular union insignia. The employer permitted only union insignia that it deemed ''professional.'' Ultimately, the Board concluded that the employer's prohibitions were not based on any ''legitimate concerns.'' The Board thus did not hold that permitting some union insignia is universally irrelevant—only that the *Holladay* employer's distinctions between permissible and prohibited union insignia did not justify its discriminatory enforcement of its dress code.

[11] *Escanaba Paper Co*., 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp*., 73 F.3d. 74 (6th Cir. 1996), cited by my colleagues, does not warrant a different conclusion. I participated in Escanaba and follow its holding here. In my colleagues' view, the Respondent here, like the employer in *Escanaba*, has failed to demonstrate special circumstances justifying its prohibition. I do not agree. *Escanaba* recognizes that special circumstances may justify a prohibition on certain messages as necessary to maintain discipline and production. That decision also holds that an employer need not necessarily wait until physical confrontation or misconduct occurs to act. Here, the enormity of the labor dispute is beyond dispute. This case is but one part of an ongoing and contentious dispute. In these circumstances, it is not mere speculation or subjective impression, but rather a reasoned judgment, to conclude that discipline and production cannot coexist with constant, plant floor denigration of the Respondent's CEO. Further, the employee messages in *Escanaba* were solely directed at employee terms and conditions of employment. Here, as discussed, the union/employee messages were directed, in substantial part, to an unprotected object—the removal of CEO Fites. Finally, the employee messages in *Escanaba* did not seek to personalize the dispute as did the union/employee messages in this case.

[12] Thus, the typical grievance meeting does not occur on the plant floor and the decorum of the grievance meeting does not necessarily and immediately affect production and discipline.

[13] I recognize that the *Oakes* court, under the ''exceptional facts'' there, found that employee protests regarding the company president was protected. The court concluded that the president's ''activities paralleled those of a low level supervisor'' and were not insulated from concerted action. But it is significant that *Oakes* involved a president of a single-facility company with about 26–27 employees. As noted, the company president in *Oakes* cost employees bonus money by diverting their efforts to his personal projects. Here, the actions of the Respondent's CEO that the employees seek to protest were not actions that paralleled in any way those of a low-level supervisor.

Oakes and *Lutheran*.[14] I do not agree with that departure from well rationalized and time-tested distinctions.

As I have shown, my colleagues are wrong on the precedent. Chairman Gould would change the precedent. Member Browning would reexamine the precedent. I would not destabilize the law. Rather, I would apply the law as it exists and find no violation in this important respect.

[14] Other courts have recognized that the employee right to seek a change of supervision is quite narrow. In *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d. 6, 8 (1st Cir. 1979), the court stated:

> Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected activity. No court has ever held that the Act protects protests over changes in top level management personnel, nor has the Board previously advocated such a rule.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against employees because they engage in union or other concerted activity protected by Section 7 of the Act.

WE WILL NOT prohibit employees from wearing insignia, or displaying flyers and posters, relating to their labor dispute including, but not limited to, buttons or T-shirts which bear the message ''Permanently Replace Fites'' or any derivative.

WE WILL NOT discriminatorily enforce rules concerning solicitation.

WE WILL NOT suggest to an employee that he seek employment elsewhere because of his protected concerted activity.

WE WILL NOT deem the wearing of a ''Permanently Replace Fites'' T-shirt to be a first offense within the discipline system.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten plant closure if the Union does not agree to our contract proposal.

WE WILL NOT discourage the filing of grievances, including the filing of mass grievances.

WE WILL NOT unilaterally announce stricter enforcement of work rules.

WE WILL NOT require prior management approval of union insignia to be worn or displayed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Rohrbaugh reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Dennis Rohrbaugh whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL make whole Edward Benedict, William Burns, Harry Burrows, Donald Coddington, Robert Coppenheaver, Shawn Kline, Barry Koicuba, Robert Lloyd, Kenneth Myers, Terry Orndorff, Dennis Rohrbaugh, John Samac, Rosella Sentz, John Solovey, George Swemley, Marvin Weyand, Robert Whiteford, Ted Williams, Robert G. Hilderbrand Jr., Wilson Hostetter, Dennis R. Angle, Thomas E. Heath and Wayne Snedegar, for any losses they may have sustained as a result of their unlawful suspension, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline, discharge, or suspension of the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline, discharge, and or suspension will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to employees' commission of a ''first offense'' for having won a ''Permanently Replace Fites'' T-shirt and, within 3 days thereafter, WE WILL notify each employee deemed to have committed a first offense for wearing a ''Permanently Replace Fites'' T-shirt that reference to this has been removed from our records and will not be used against him in any way.

WE WILL rescind our unlawful ''first offense'' rule concerning display of the ''Permanently Replace Fites'' message or other protected union messages and any ''second offense'' determination which results from that rule.

WE WILL rescind the stricter enforcement policy concerning the work rules for unit employees.

WE WILL rescind the rule requiring employees to obtain prior management approval of union insignia.

CATERPILLAR, INC.

Nathan W. Albright, Esq., for the General Counsel.
Gregory J. Malovance, Esq., of Chicago, Illinois, and *Bruce D. Bagley, Esq.*, of Harrisburg, Pennsylvania, for the Respondent.
William W. Thompson II, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. Cases 33–CA–10158, 33–CA–10159, 33–CA–10160, and 33–CA–10161 were tried before me on various dates from April 19 to 27, 1994, though they had been consolidated with others, the trial of which began in June 1993. Following the close of the hearing, I entered an order severing these cases for briefing an decision. These matters focus on the Respondent's prohibition of wearing various insignia and the discipline of several employees for noncompliance, all of which is alleged violative of Sections 8(a)(1) and (3) of the National Labor Relations Act. There are also allegations of threats and other violations of Section 8(a)(1) and the alleged discharge of an employee in violation of Section 8(a)(3).

The Respondent denied that it has engaged in any violation of the Act, and affirmatively contends that it was privileged, under the circumstances here, to ban certain insignia and to enforce this ban through discipline; and that it discharged the employee in question for cause.

On the entire record (including those relevant portions of the record made during other phases of this litigation), arguments and extensive briefs of counsel and my observation of the witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with its principal office in Peoria, Illinois, and facilities throughout the United States and overseas, one of which is at York, Pennsylvania. The Respondent is engaged in the manufacture and sale of heavy construction machinery and related products. In the course and conduct of this business, the Respondent annually sells and ships directly to points outside the Commonwealth of Pennsylvania goods, products, and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, International Union United Automobile, Aerospace & Agricultural Implement Workers of America (the International) and its Local 786 (the Union) are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. In general

Although the allegations here have been severed for decision, they are part of an extensive and intensive labor dispute between the Respondent and the International which has resulted from their inability to negotiate a collective-bargaining agreement to replace the one which expired on October 31, 1991. (Traditionally there has been a central agreement and local supplements covering particular facilities.)

By way of background, certain employees at other of the Respondent's facilities commenced a strike in November 1991. This was followed by a lockout of other employees. On February 7, 1992,[1] the Respondent ended its lockout and on February 16, the International converted the lockout to a strike at these facilities. Thus, by March nearly 13,000 employees at six plants in the Peoria area were on strike.

On March 31, Respondent's chief executive officer, Donald Fites, wrote various union officials stating that if the strike did not end they would commence hiring permanent replacements. Shortly thereafter, about 1000 striking employees crossed the picket line and returned to work, and on April 16, the International ''recessed'' the strike. (There have subsequently been seven short work stoppages, and a strike which began on June 20, 1994, involving generally these same employees, which continues to the date of this decision.)

Following recess of the strike in April, the International and various locals have undertaken to pursue their bargaining demands through an ''in-plant'' or ''corporate'' strategy by which, among other things, employees are encouraged to ''work to the rule'' and display buttons, T-shirts, posters, and the like with an assortment of messages. This strategy has been countered by the Respondent in various ways, including the banning of certain buttons, T-shirts and posters. Many of these reactions by the Respondent account for most of the alleged unfair labor practices in the complaints which have been litigated or are pending. Only those occurring at York during 1992 and early 1993 are the subject of this decision. Other discrete phases of this dispute will be decided subsequently.

Although the genesis of this dispute is the parties' failure to negotiate a central collective-bargaining agreement and local supplements to succeed the ones which expired in October 1991, there are no allegations of bad-faith bargaining in any of the complaints before me. Indeed, there have been few and limited bargaining sessions. It appears that the principal dispute between the parties concerns the principle of ''pattern bargaining,'' which the Union demands and the Respondent rejects and there are a range of economic issues. On these the Board will take no position. The parties will ultimately have to meet and resolve them through bargaining. The purpose of the Act is simply to insure that they bargain in good faith in an atmosphere free of unlawful pressure from either side. *H. K. Porter Co., v. NLRB*, 397 U.S. 99 (1970).

[1] All dates are in 1992 unless otherwise indicated.

2. At York

On April 8, about 160 members of Local 786 picketed the Respondent's annual stockholders' meeting at Wilmington, Delaware. Among the signs used were ones reading ''Permanently Replace Fites.'' Kenneth Myers, a longtime employee at York and then a union steward, was one of the pickets.

At work the next day, Myers attached to his T-shirt, a preprinted sign of the size and type used at Wilmington which read, ''Permanently Replace Fites.'' Wayne Glass, Myers' supervisor, told him to remove the sign,[2] and when Myers refused to do so, Glass discharged him for insubordination.[3] Subsequently Myers agreed to remove it, and York Labor Relations Manager Harold Booze rescinded the discharge. Myers suffered no loss of pay.

This incident became the subject of a charge filed by Local 786 in Case 5–CA–22830 and the complaint in 33–CA–10158. This complaint issued on September 22, subsequent to which, the Union procured red T-shirts with the inscription in small lettering ''The NLRB's complaint against Caterpillar alleges that the company's discharge and harassment of Ken Myers for wearing a . . . sign violated the Act.'' In much larger and centered letters was inscribed, ''PERMANENTLY REPLACE FITES.''

The first mass wearing of these T-shirts occurred on November 24, which I will refer to as T-shirt day. On that day, by prearrangement, employees reported for work either wearing the T-shirt under another garment, or intending to put one on later. In either case, on a predetermined signal, they displayed the red T-shirt and were immediately told by their respective supervisors to cover it up, turn it inside out or take if off and absent compliance they would be suspended for insubordination. Most of the participants complied, but 148 of them were nevertheless placed on a ''1st. Offenders List.'' Eighteen refused and were suspended for 2 weeks and another complied with the T-shirt directive, but was suspended for later putting on a sticker.[4] Those who refused, upon being admonished by a supervisor, read from a yellow card furnished by the Union.[5]

Between Myers' discharge and T-shirt day, the complaints allege numerous acts of interference with employees' Section 7 rights, including bans on solicitation, bans of various insignia, signs, and buttons, and threats. There are additional alleged violations by the Respondent centered on banning slogans, another suspension on November 24, and the discharge of Denny Rohrbaugh on January 20, 1993 (after a 2-week suspension). These allegations will be treated seriatim in the analysis section below.

[2] Case 33–CA–10158, 5(a).

[3] Id. at 6(a).

[4] Case 33–CA–10159 et al., 9 and 10.

[5] The card reads:

> Section 7 of the National Labor Relations Act guarantees my right to support my union and to engage in concerted activities for the purposes of collective bargaining and mutual aid and protection. I believe your order that I remove my T-shirt interferes with my Section 7 rights and is unlawful. If you take any action against me for this, I will report it to the Union's lawyers and request that a charge be filed on my behalf with the National Labor Relations Board to enforce my rights.

B. *Analysis and Concluding Findings*

1. Banning certain insignia

a. *''Permanently Replace Fites''*

This phase of the litigation deals almost entirely with the Respondent's determination to prohibit employees from wearing or displaying anything which reads, ''Permanently Replace Fites'' or any derivation thereof, including any other spelling of Fites (e.g., Fights) or any abbreviation of the slogan (e.g., PRF).

Another phase of this litigation, involving the Peoria area plants, deals more broadly with the insignia issue. In brief, that phase concerns insignia (including the ''Replace Fites'' T-shirt) worn by returning strikers in the context of some unit employees having crossed the picket line to return to work and the Union's announced policy of pursuing an inplant strategy. The employees at York did not go on strike and the specific items prohibited were much more limited. Though the general rules concerning what a company may prohibit its employees from wearing, and under what circumstances, are the same, the context is markedly different. The analysis here will therefore be limited only to the York situation.

From early in its history the Board has considered the question of whether and to what extent an employer may prohibit employees from wearing buttons, hats, and T-shirts with messages relating to activities protected by Section 7. Thus in 1945, the Supreme Court held that the Board has the statutory responsibility of accommodating employees' right to self-organization with the employers' ''equally undisputed right'' to maintain discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

Most recently in *Escanaba Paper Co.*, 314 NLRB 732 (1994), the Board reaffirmed that employees generally have the right to wear insignia relating to their right to bargain collectively, although such can lawfully be prohibited if the employer is able to prove there existed ''special circumstances.'' That even the most offensive and imprecatory messages are protected by Section 7 has been recognized by the Supreme Court, albeit in dicta since these cases involved libel and preemption. *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

At issue here is whether the Respondent established such ''special circumstances'' with regard to the ''Permanently Replace Fites'' message. I conclude it did not.

The Respondent argues that the slogan, ''Permanently Replace Fites'' was a personalized and disparaging attack on him which it lawfully would not permit. I find this unsupported by any evidence or rational argument.[6] I find nothing in this message which would tend to vilify Fites or could be remotely construed as a personal attack on him.[7]

[6] During the course of this dispute, at York as well as other facilities, there have in fact been some display of messages which unarguably amount to personal attacks on Fites and which the Union does not argue can be prohibited. (C.P. Br. 72.) To the extent alleged as violations, these other references to Fites will be treated in subsequent decisions.

[7] Compare. In the ''button'' phase of this litigation there was banned a button which seemingly depicts Fites as a lush and the message, ''One More Drink and I Can Run Caterpillar.''

The Respondent also argues that the message worn by Myers and others on T-shirt day was part of an effort by the International to seek the removal of Fites as the Respondent's chairman. The Respondent contends that the slogan was used before March 31 when Fites announced the proposed permanent replacement of strikers. Therefore, it could not, as argued by the Union, be a double entendre. And, the argument continues, since discharge of a management person would be an unlawful demand, the message could be prohibited, citing *Lutheran Social Services of Minnesota, Inc*., 250 NLRB 35 (1980). I reject this argument.

As the Respondent's chief executive officer, Fites, is more than just another management official. He is the personification of the Company. He is the Respondent's alter ego. Whatever personal right he may have to be protected from having his name used in a derogatory way in this dispute must be considered in relation to his position.

Although the Respondent had the right to replace economic strikers permanently, and therefore could advise them it intended to start doing so, implicit in this message is that the striking employees were causing the labor dispute. It was therefore certainly fair comment for those employees counter with their message that the cause was Fites.

Further, I do not believe that the ''Permanently Replace Fites'' message can be viewed as any kind of actual attempt to force his discharge. It was not so much that employees literally wanted Fites replaced as they objected to the Respondent's stated policy of using permanent replacements, a policy they reasonably associated with Fites. Indeed, neither Myers nor any other employee has the power to cause Fites' termination. In this context, I conclude that the message was a statement relating to the employees' protected rights in the bargaining dispute.

But even if an object of the T-shirt and other insignia was to cause the removal of Fites as the Respondent's chief executive officer, on the facts here, such was protected. Employee activity which seeks ''to influence (the) identity of management hierarchy (is) normally unprotected.'' However such activity is protected where the identity of a supervisor directly relates to terms and conditions of employment, which in turn is based on whether (1) the protest originated with employees, (2) the supervisor dealt directly with employees on matters of concern to them, (3) the identity of the supervisor directly related to terms and conditions of employment, and (4) the reasonableness of the means of the protest. *NLRB v. Oakes Machine Corp*., 897 F.2d 84 (2d Cir. 1990), enfg. 288 NLRB 456 (1988).

Because Fites was perceived to be the driving force behind the Respondent's uncompromising position in rejecting pattern bargaining and the possibility that York would close, as well as the announced intent to permanently replace strikers, in this situation the identity of the CEO did directly relate to terms and conditions of employment. And through the bargaining process he did deal directly with employees. Wearing the ''Permanently Replace Fites'' T-shirts seems to have originated with the employees. Indeed, Myers was the first to wear such a sign at work and he did so on his own initiative. Finally, these T-shirts are certainly a reasonable means of stating the message. Therefore, the employees, in this case, had the protected right to seek the ouster of Fites as the Respondent's CEO.

The Respondent also argues that this and other messages were integral to the Union's in-plant strategy. Since such is tantamount a partial strike and therefore unprotected, citing *Audubon Health Care Center*, 268 NLRB 135 (1983), all slogans displayed by union members are unprotected and could therefore be prohibited. In effect, the Respondent argues that any unprotected activity engaged in by the Union or some members vitiates everything the employees did or may do during the course of this dispute. I find no authority for such a proposition and I reject it. While I believe there is a serious and difficult question concerning whether some aspects of the in-plant strategy might be unprotected (for instance, ''work to the rule''), such need not be decided here. There is no evidence that York employees invoked any kind of ''work to the rule'' and the Respondent did not offer convincing evidence that the ''Permanently Replace Fites'' message had any connection with such an effort. Thus, regardless of whether ''work to the rule,'' or any other strategy, may ultimately be found unprotected, employees at York had the right to display the ''Permanently Replace Fites'' message.

Similarly, the Respondent argues that the ''special circumstances'' of this situation includes mass use of buttons, flyers, T-shirts and posters all of which were part of the Union's in-plant campaign and were designed to create dissension and disharmony and thus adversely affect production. In effect, the Respondent argues that a message which employees would generally have the protected right to display can be prohibited if there are masses of messages some of which can be prohibited. No authority is cited for such a proposition and I find none. I reject this argument. I believe that each message, whether displayed in mass or individually, must be viewed on its own to determine whether it is outside the protection of Section 7. The fact that some employees may draw and distribute offensive and scurrilous cartoons of Fites and other management personnel, for instance, should not deprive other employees from wearing protected insignia. The unprotected speech can be banned, but this should not give the Respondent license to ban all speech of employees or to pick and choose which to ban and which to allow.

There is evidence that cartoons and posters were circulated at York in substantial numbers and that many employees wore buttons and T-shirts bearing messages relating to the labor dispute. And it may reasonably be inferred that such was part of a concerted campaign on the part of the Union to demonstrate solidarity among employees. This fact, however, and the fact that some of the cartoons went beyond civility does not condemn the display of all messages, particularly the ''Permanently Replace Fites'' T-shirt.

I therefore conclude that the Respondent violated Section 8(a)(1) of the Act by prohibiting Myers, and others, from wearing or otherwise displaying T-shirts or signs with the message, ''Permanently Replace Fites,'' or any derivative.

An example of the Respondent's enforcement of this unlawful prohibition is the suspension of 18 employees on November 24 when they refused to take off or cover up their T-shirts. Another example (one alleged as an independent violation)[8] is the Respondent's announced policy that telling employees to take off their T-shirts constituted a first offense (even if they complied); thus, a further violation of plant

[8] Id. at 17.

rules would be treated as a second offense and would result in more severe discipline.

This announcement is alleged as a change in the Respondent's discipline policy and therefore violative of Section 8(a)(5) and as well as Section 8(a)(3). I find no change in the Respondent's discipline procedure; rather I conclude this was integral to the unlawful ban of the Fites T-shirt. Therefore I conclude that the Respondent did not unilaterally change terms and conditions of employment in violation of Section 8(a)(5). Nevertheless, announcing that wearing the T-shirt was a first offense amounts to enforcement of the unlawful prohibition in violation of Section 8(a)(3).

Also alleged as an independent violation of the Act[9] involved employee Harry Burrows and his supervisor, John Glatfelter. Burrows asked about wearing a Fites T-shirt to the Christmas party. Glatfelter said, ''Please, do not wear the shirt.'' And Burrows did not. Though couched in terms of a request rather than an order, this clearly was a directive against engaging in protected activity was therefore violative of Section 8(a)(1).

For the same reasons I conclude that the Respondent violated Section 8(a)(1) when, on November 3, Labor Relations Manager Larry Staker told union officials that any display of ''Permanently Replace Fites'' would be prohibited, including any derivative thereof, and on November 4 when Staker told Terry Orndorff to take off his Fites button during a meeting of union and company officials.[10]

b. *''No Contract, No Peace'' sign*[11]

The undisputed evidence of this allegation is that union committeeman John Samac saw supervisor Keith Erhart remove a sign from an employee's toolbox which read, ''No Contract, No Peace.''

The Respondent also does not contest the unlawfulness of this act. Rather, the Respondent contends that it was de minimis and isolated, inasmuch as many such signs were not removed by its management.

If this were the only instance of banning a slogan, then the Respondent might have a point. However, it clearly was not. I consider all slogans expressing the employees' position to be of the same character, even though the words and precise message may differ.

The Respondent does not argue that there is some special circumstance which would allow it to ban ''No Contract, No Peace.'' Therefore, I conclude the Respondent violated Section 8(a)(1) when Erhart removed the sign.

c. *''Our Hero'' button*[12]

One day in the early fall, Committeemen Dennis Rohrbaugh and John Solovey had occasion to meet with Labor Relations Manager Staker. At the time Rohrbaugh, as he had in the past, was wearing a button on which there was a caricature of Harold Booze and the caption, ''Our Hero.''

Staker told Rohrbaugh that he felt the button was offensive and asked him to take it off. After some discussion, which included reference to a flyer which the same caricature but the caption ''I Closed York,'' Rohrbaugh took off the button.

Citing *Caterpillar Tractor Co.*, 276 NLRB 1323 (1985), the Respondent argues that this button represented personal ridicule and could therefore be banned. In the cited case, which also took place at the York facility, a union steward was discharged for drawing and circulating a vulgar, disgusting, and extremely scurrilous cartoon of a supervisor, far exceeding anything in evidence—whether prohibited or not. The button Staker banned was not in the same category as the cartoon in the earlier case.

I do not share the Respondent's view that the button here was particularly malicious, defamatory, or insubordinate nor, apparently, did Booze. He had seen the button and from the evidence seemed amused. At least he did not offer a protest. The Respondent's subjective assertion is simply not sufficient to support this act of censorship. I therefore conclude that by causing Rohrbaugh to remove the button, Staker violated the Act.

d. *''I Don't Like Fights''*[13]

Among the signs which Supervisor John Moul took from employee tool boxes in late October was one reading ''I don't like Fights.'' This was clearly an altered spelling of Fites which employees had the protected right to display. Accordingly, Moul violated Section 8(a)(1) by taking it down.

e. *The 3-percent raise sign*[14]

Another sign which Moul removed from an employee tool box was one which read, ''C Building Got A 3 Percent Raise, Are You Pissed Off Yet?'' The Respondent does not dispute the facts of this allegation but contends that at most it was a de minimis violation of the Act. However, essentially the same sign was ordered by Supervisor Barry Day to be taken off an employee's toolbox, and a leaflet to the same effect was ordered removed from Don Coddington's toolbox by Superintendent Joe Taylor on grounds it was ''derogatory,'' as was a company handout on which had been written ''bullshit.''

The Respondent further contends that line supervisors had the authority to determine what vulgarity could be proscribed, that these words exhort hostility and that absent evidence that the prohibitions were motivated by union animus there can be no finding of a violation. I am not persuaded.

''Pissed off'' and ''bullshit'' may be vulgar, but they are a long way from being so obscene as to be banned from the shop floor, especially where used as part of a message clearly protected by the Act. I doubt the sensitivities of these supervisors were shocked. I conclude that the banning of these message, much as with the others, was engaged in as a demonstration of control in and of itself—announcing to employees that the Respondent would make the rules governing employee communication—rather than with a purpose of bringing decorum to the plant. In evaluating the offensiveness of particular words, the standards of the community in which they are published is a critical factor—much like the Supreme Court's current test for obscenity. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

In evidence are several extremely vulgar T-shirts, which have been worn by employees relating to events having nothing to do with the labor dispute (e.g., the 1991 Gulf War and

[9] Id. at 8(o).
[10] Id. at 8(h).
[11] Id. at 8(a).
[12] Id. at 8(d).
[13] Id. at 8(e).
[14] Id. at 8(e), (f), and (g).

explicit sexual activity). These were not prohibited, in response to which counsel for the Respondent argues there is no evidence that the supervisors were aware that employees wore such T-shirts. I reject this argument. I credit the testimony that such T-shirts were commonly worn and I infer that supervision knew it. I conclude that under the standards of the shop floor, vulgar, indeed outright obscene, T-shirts and other matter was not objectionable. Thus I reject the Respondent's argument that certain messages could be banned because of their obscene character.

Jerry Brust, the Respondent's corporate manager of labor relations, testified that the company sponsors many tours of its manufacturing facilities as a marketing tool and that between 1990 and 1992, an average of 39,000 visitors a year came to its facilities. Thus, it is argued, the Respondent has a legitimate business reason to prohibit such messages as displayed by employees in support of their union. I reject this argument in the context of this case. First, there is no evidence of any visitors to the facility in question or to the employees' parking lot. Secondly, the Respondent condoned some very vulgar and obscene T-shirts not relating to the labor dispute. The community standard of the plant is that obscene messages are acceptable. Perhaps there is a line, but the signs in question hardly even approached it. And third, messages in support of the employees' side of a labor dispute are in a different category than other messages. They are in a privileged class. They are protected unless there is proof of special circumstances.

The Respondent contends that the General Counsel failed to prove an unlawful motive. Suffice it that motive is not an element of an 8(a)(1) violation—the test is whether the action interfered with employees' Section 7 rights. However, on the facts here, I conclude that the supervisors who demanded removal of the ''pissed off'' and ''bullshit'' signs were not motivated by a sincere desire to rid the shop floor of offensive vulgarity. I conclude they in fact were motivated by an effort to diminish the employees' ability to seek solidarity of their position with regard to various aspects of the dispute.

Accordingly, I conclude that by ordering removal of the signs and flyers protesting the raise given other employees and questioning the Respondent's position on bargaining issues, he Respondent violated Section 8(a)(1) of the Act.

f. ''*Man of the Year*''[15] *and* ''*Dog Fights*''[16]

Coddington testified that on a calendar on which was written ''Permanently Replace Fights'' he had inserted the word ''Dog'' before ''Fights.'' He also had folded this portion of the calendar so that it was not visible and attached it to his tool box. His supervisor, Darryl Grover, told him to remove it. Coddington protested that he simply was announcing his displeasure with dog fights. This cleverness is in the same category as Snedegar's testimony. Nonetheless, he had the same protected right to display the calendar.

Similarly, Coddington had a poster which depicted Fites as Scrooge and the caption, ''Don Fites Caterpillar's Man of the Year.'' However, he had put this on his tool box with the back (a blank sheet) facing out. On November 18 he was told by Moul to remove this.

The calendar was a variation on the ''Permanently Replace Fites'' message and should not have been ordered removed. The ''Man of the Year'' poster, though somewhat more derogatory toward Fites, was, in the context of this dispute, fair and protected comment and likewise should not have been ordered removed. The accepted connotation of Scrooge is that of an unreasonable and demanding miser. Where employees believe they are not being given the pay they deserve, or their jobs are threatened, such a depiction of the Company's chief executive officer would be a protected message. This is the case whether the messages could actually be seen or not. Accordingly, I conclude that the Respondent violated Section 8(a)(1) by ordering Coddington to remove from his toolbox these documents.

g. ''*Loose Cannons*''[17]

In November, employee Thomas Heath put a sign on his tool box which read, ''People unknowing Of All The Facts Often Run Around Like Loose CANNONS!!!'' This was undeniably a reference to employee Bob Cannon, who had written ''several articles in the paper which denounced union officials.''

Two or three days later, Heath was told by his supervisor, Ron Johnson, to take the sign down, because it referenced Bob Cannon. This was scarcely obscene or sufficiently demeaning to an employee to justify the Respondent's order. Cannon had written a letter to the editor of the York newspaper critical of the Union and thereby had made a public statement regarding the substance of the labor dispute. It was fair for a fellow employee to take issue with this, and by prohibiting the sign, the Respondent violated Section 8(a)(1).

h. ''*Permanently Replace Scrooge*''[18]

In December, Richard Allison asked his supervisor, John Moul, if he could wear the red T-shirt if he covered ''Fites'' with ''a character from Charles Dickens.'' Moul said that would be all right; however, when Allison came to work wearing a red T-shirt with ''THE SCROOGE ASAP'' over ''Fites'' Moul told him to take it off. Allison protested that he had been given permission, but on Moul's insistence, turned the T-shirt inside out.

The permission Allison claims to have received was, of course, based on his disingenuous request. Moul did not intend to give permission for Fites to be represented by Scrooge. I therefore disagree with the Charging Party's argument that Moul changed the rule. I agree with the Respondent that the alteration of T-shirt did not change the essential message. However, for the reasons given above, I conclude that the Respondent violated Section 8(a)(1) by requiring Allison to cease displaying the T-shirt.

2. The discharge of Kenneth Myers

There is no dispute concerning the material facts of Myers' discharge. He attached a sign to his T-shirt which read ''Permanently Replace Fites.'' He was told to take it

[15] Id. at 8(i).

[16] There is no complaint allegation on this, but it was fully litigated.

[17] Id. at 8(m).

[18] Id. at 8(p).

off. He refused and was discharged. He later recanted, and was reinstated without loss of pay.

Since I have concluded that the Respondent could not lawfully prohibit employees from wearing the ''Permanently Replace Fites'' message, it follows that the discharge of Myers for doing so violated Section 8(a)(3) of the Act. The Respondent's violation in this respect was not cured by Myers' reinstatement without loss of pay, nor is the Board required to defer to the parties' private adjustment, particularly since Myers' reinstatement was predicated on his ceasing activity which he had a right to engage in.

3. Suspensions for displaying Fites T-shirts.

a. *T-shirt day*

On November 24 at least 167 employees (148 on the ''1st Offenders List'' and 19 suspended) came to work wearing, or put on at work, the red T-shirt referred to above. When ordered by management to remove, or otherwise cover the T-shirt, many responded by reading from a yellow card which generally noted their Section 7 rights. Eighteen employees refused the order and were suspended for 2 weeks and another was suspended for wearing a sticker. The others complied.

Since I have concluded that displaying the ''permanently replace Fites'' message was protected concerted activity, in support of the employees' position in the labor dispute, the Respondent violated Section 8(a)(3) by suspending them for doing so and for treating those not suspended as having committed a first offense under the Respondent's discipline system.

However, I specifically do not accept the Charging Party's rationale that the T-shirts worn on November 24 and displayed thereafter are different in substance from the sign worn by Myers. It is argued by counsel for the Charging Party that the small lettering on the T-shirt ''communicated that the General Counsel had issued an unfair labor practice complaint regarding the Myers incident. Surely employees have the right to communicate such a fact for the self-evident reason of expressing common cause in opposition to their employer's apparently illegal action.'' (C.P. Br. 89, 90.)

I view this argument to be in the same category as the ''fights,'' ''fit s,'' and ''dog fights'' variations. Any viewing of the T-shirt from more than a few feet reveals the message, ''Permanently Replace Fites.'' The rest of the message is too small to be read. However, the small lettering and the Charging Party's argument does vitiate the otherwise protected nature of the T-shirt.

b. *Wayne Snedegar*[19]

On T-shirt day Snedegar wore a red T-shirt, which on order he turned inside out. Then he affixed to his T-shirt a sticker which stated ''No More Fights.'' He was told to take it off. Snedegar testified that he put on this sticker, which was one of several such laying somewhere near his work station, because he had heard Supervisor Barry Anderson had grabbed employee Richard Williams that day. He testified that it ''never occurred to'' him that the ''Fights'' sticker could have been related to Fites and Fites' policies.

I discredit this testimony and reject the apparent support of such testimony by counsel for the General Counsel and the Charging Party. I have no doubt that ''Fights'' was, and was meant to be, an altered spelling of ''Fites,'' and that Snedegar's denial was, and was meant to be, disingenuous. The sticker was one of many, certainly made prior to the alleged Anderson/Williams confrontation. I believe that he sought to mislead me on what he perceived to be a material matter—that ''Fites'' could be prohibited but ''fights'' could not.

Nevertheless, I do not have to credit Snedegar or accept the argument of counsel in order to conclude that the Respondent violated Section 8(a)(3) in suspending Snedegar for having the ''No More Fights'' sticker on his T-shirt.

c. *Robert Hildebrand*[20]

On December 1, Robert ''Dutch'' Hildebrand wore one of the red T-shirts with the ''e'' in ''Fites'' covered. Shortly after lunch, according to Hildebrand, he was told by his supervisor to stop production, lock his toolbox and come to the conference room and his steward would meet him there. Hildebrand was suspended for two weeks under the new policy of prohibiting the wearing of these T-shirts, notwithstanding his protestation that he simply was announcing his opposition to fits, meaning, he testified, ''a tantrum or inappropriate behavior.''

The Respondent's managers did not believe his explanation, nor do I. Nevertheless, I conclude that the Respondent violated Section 8(a)(1) and (3) by suspending Hildebrand for wearing the T-shirt. As with similar protestations, his incredulous assertion did not vitiate his protected right to wear the T-shirt.

d. *Parking lot suspensions*[21]

In December Willie Hostetter and Thomas Heath were suspended for having a red T-shirt so presented in their respective vehicles in the employee parking lot that the message could be seen. Hostetter was suspended for 2 weeks and Heath for 3 weeks. Similarly, Dennis Angle was suspended for writing ''Permanently Replace Fites'' on the sunscreen of his vehicle. This was subsequently revoked and he suffered no loss of pay.

In agreement with the General Counsel and the Charging Party, I conclude that employees have a protected right to display signs on their private vehicles which give a prounion message, absent some legitimate business reason to prevent such. *Swan Coal Co.*, 271 NLRB 862 (1984). The Respondent presented no evidence from which to conclude that banning the messages displayed was justified. The Respondent simply reasserted its argument that ''Permanently Replace Fites'' messages could be prohibited.

Accordingly, I conclude that the suspensions of Hostetter, Angle, and Heath violated Section 8(a)(3), notwithstanding that Angle's suspension was withdrawn.

[19] Id at 9. The transcript at 6622 incorrectly reads, ''No more Fites.'' It should read ''No more Fights.''

[20] Id. at 11.

[21] Id. at 12, 13, and 14.

4. Other alleged violations of Section 8(a)(1) and (3)

a. *Greeting card solicitation*[22]

It is alleged that on May 12 Myers was disciplined for circulating a get well card on company time, a practice which had been allowed in the past, as the Respondent admitted. The Respondent contends that its supervisor, Glass, did not violate the Act in this respect because the card did not relate to protected activity and ''Myers' overall performance had been declining.'' (R. Br. 109.)

The only evidence that Myers' work performance had dropped off such as to justify restricting his theretofore condoned activity is the opinion of Glass the supervisor who had discharged Myers, only to see Myers reinstated. Conversely, on January 30, and before the discharge incident, Glass had given Myers a positive evaluation.

No doubt the solicitation of greeting cards is not concerted activity for employees mutual aid and protection. Nevertheless, if Glass disciplined Myers for his union activity and used the solicitation as a pretext, then there was a violation of the Act. I conclude such is what happened. There is so little evidence that Myers' work performance had in fact deteriorated or that he in fact abused Glass' permission to circulate cards, that I conclude Glass' true motive related to Myers' union activity. At worst Myers continued to solicit cards 4 minutes into the shift, which was so trivial that it scarcely amounted to an abuse of the solicitation privilege. I therefore conclude that Glass violated Section 8(a)(1) and (3) as alleged.

b. *Threat to Myers*[23]

Also on May 12 Glass passed out to employees a memo setting forth the Respondent's final offer. The next day Myers returned it to Glass with a series of questions. Glass then said, ''Why don't you go look for another job. Your work effort is deplorable, you affect everybody around you. Why don't you take a day off and see what's available out there if its so bad here.''

The Respondent agreed that this event happened generally as testified to by Myers; but contends that Glass simply ''chose to express his opinion that Myers take a vacation day to seek what the job market was like so that he would be more appreciative of his Caterpillar job.'' (R. Br. 110.)

In the context of Myers' overt union activity and this overall dispute, I conclude that the comment by Glass was not an innocent opinion. Rather, it was a threat in violation of Section 8(a)(1). *Chelsea Homes, Inc*., 298 NLRB 813 (1990).

c. *Cycle-timing Myers*[24]

It is alleged that on June 4 Glass cycle-timed Myers (a process by which the time taken to produce a part is measured) and thereby violated Section 8(a)(1) and (3) of the Act. The fact of the cycle-timing, and comments of Glass to Myers and Myers statements to Glass are generally undisputed. Though the General Counsel and Charging Party seem to argue that Myers was discriminatory singled out for cycle-timing, their argument for finding discrimination is in the comments Glass made to the effect that he did not trust Myers, and that somehow Myers was ''screwing the Company,'' and that only one other employee was cycle-timed during this period.

When Glass conducted the test, he found that Myers was taking 5 minutes to produce a part. It is not contended that this result was unacceptably slow and I assume that the cycle-timing disclosed that Myers was doing his work at a reasonable pace. There is nothing in the record to the contrary.

However, when Glass left work on June 4, Myers had seven parts in his bin to complete. On talking to Myers the next day, Glass concluded that it had taken Myers 2 hours to do those seven parts (instead, presumably, of 35 minutes). That is when Glass told Myers he thought Myers was ''screwing the Company.''[25]

Myers filed a grievance about this and stated in part: ''And he (Glass) asked me if I had stayed an hour over the day before, and I told him yes, and he said, You're not working for the UAW. Why only seven pieces in two hours.' And I told him I didn't know what to tell him. And he said, 'You're screwing the Company somehow, and I don't have time to baby-sit you.'''

Although Myers testified that he in fact ran the seven pieces and then proceeded to other tasks on June 4, he did not tell this to Glass. In his grievance he reported that ''I didn't know what to tell him.'' Whether Myers in fact ran the seven pieces in acceptable time, on the facts as presented by the General Counsel, Glass could reasonably have concluded he did not.

Engaging in protected activity does not immunize an employee from supervision. On these facts, I conclude that Glass did nothing more than supervise Myers, and when it appeared that Myers had poorly performed, questioned him on it. Since Myers did not tell Glass what he claims to be his story, the response of Glass is not so unreasonable as to require the inference that there was an unstated and unlawful motive. Notwithstanding that I have concluded that Glass violated the Act in other respects concerning Myers, I conclude that the allegation involving cycle-timing was not established.

d. *The June 12 allegation*[26]

On June 12 Myers filed a grievance relating to the cycle-timing, following which words were exchanged between him and Glass. Though there is some dispute concerning exactly what was said, they do agree that Glass said something to the effect that he did not trust Myers and felt that Myers conduct was intended to destroy York jobs.

The General Counsel alleges that Glass threatened Myers in violation of Section 8(a)(1) and was unhappy with Myers because of Myers' activity as the union steward. By this time Myers' productivity had been questionable, a fact which even Myers admitted.

There is simply nothing in this sequence of events which suggests that Glass discriminated against Myers, disciplined him in any way, or threatened him. No doubt Myers provoked Glass into comments he might better not have made. But just because there is a labor dispute in progress does not

[22] Case 33–CA–10158, 5(b).
[23] Id. at 5(c).
[24] Id. at 6(b).
[25] Id. at 5(d).
[26] Id. at 5(e).

mean supervisors need be mute or are forbidden to supervise. I find nothing threatening in the statements Myers testified Glass made. Therefore I will recommend this allegation of the complaint be dismissed.

e. *Alleged threat by Fites*[27]

On August 14 Fites made a tour of the York facility during which, with prior approval of managers, Wayne Snedegar had an opportunity to talk with Fites. As Snedegar recalled this event, Fites and his entourage came by his work station and after introductory exchanges, Fites asked what he could do to help him, to which Snedegar replied:

> Mr. Fites . . . if in fact the reputation that has preceded you here in the York plant is correct, then I need to tell you for myself and many of the other employees that I work with that we don't like that and we don't like you.

As the conversation continued, according to Snedegar, Fites pointed a finger at Snedegar's chest and said ''Wayne if you don't get this union to sit down and accept this contract we're going to close the York plant.'' Snedegar then pointed to Larry Burchell and ''I said Larry get him the f—k out of my area and don't ever bring him back and I was going on and on.'' The group including Fites left and ''I concentrated my efforts towards Larry because Larry was good enough to stand there and hear me out.''

Commodity Manager Ed Hubbard testified that he was in a position to hear the conversation between Fites and Snedegar and did not hear the part concerning plant closure. This, however, does not prove it did not happen. Rather, I conclude it did. Snedegar was credible as to this event, notwithstanding that I found him less than credible on another aspect of his testimony. Others in the area at the time, including Fites, were not called by the Respondent. Thus, I conclude the exchange occurred generally as testified to by Snedegar.

However, to find that Fites in fact made an unlawful threat to close the York facility requires finding he uttered the words in precisely the way Snedegar remembered. This I doubt. As counsel for the General Counsel notes in his brief, ''(i)t is undisputed that Respondent was contemplating closure of the York Precision Bar Stocks production unit.'' For some time the Respondent had advised employees that cost savings were necessary lest the York facility be closed. This was a matter of ongoing concern and indeed the Respondent attempted to negotiate a separate contract for York, a proposal which was summarily rejected by Bill Casstevens, the chief negotiator for the International and its secretary-treasurer. In view of the Respondent's longstanding position concerning the profitability of York and the Union's adamant refusal to consider a separate contract, I conclude that Fites' statement to Snedegar was permissible, and not violative of Section 8(a)(1). *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

f. *Alleged threats by Little*

Al Little has been a supervisor for 21 years, before which he was a union steward and committeeman. Gary Shearer is the steward in one of Little's departments and an employee who has worked for Little 10 years. According to Shearer, in late August Little asked if he had gone to a union rally at which Casstevens spoke. Shearer said yes and when Little asked if Shearer had said anything, he said no. Little then said, ''You screwed up. You should have spoken out against the union and put them down.''

Citing *Rossmore House*, 269 NLRB 1176 (1984), the General Counsel alleges this statement was interrogation somehow followed by a threat and therefore violative of Section 8(a)(1) of the Act.[28] I disagree.

Rossmore House and related cases took place in the context of an organizational campaign. And the interrogation was accompanied by an actual threat. Little's question to Shearer, and the following comment, took place in the context of a labor dispute in which individuals who have known each other for years have strong and differing opinions. I find nothing in Little's comment which amounted to a threat nor has argument been advanced as to how it was threatening.

I find that Little's conversation with Shearer was nothing more than shop talk between two individuals who have worked together many years. To find unlawful interrogation here would mean than first-line supervisors cannot talk to employees about the subject which is of paramount concern to them all. I will therefore recommend that this allegation be dismissed.

It is further alleged that Little threatened Shearer and interfered with his protected right to file grievances for employees during the period November 20 to 25.[29] In brief, Shearer had received 20 identical grievances from employees protesting the Respondent's actions relating to committeemen (which is the subject of another phase of this litigation).

According to Shearer, when Little discovered the grievances were identical, he expressed anger and told Shearer that if the union leadership did not ''wake the fuck up, they will close this motherf—king place down.'' Little also said something to the effect that he ''used to have respect for this local but I don't anymore.'' Little admitted that on reading the grievances he became upset because they were all the same and on asking Shearer why, Shearer said that was the way the ''hall'' wanted it.

The General Counsel and Charging Party argue that filing a mass of identical grievances was an innocent act by the several employees, each of whom was individually concerned about the committeeman matter, and that Little interfered with their right by his comments to Shearer and in this context threatened plant closure. I disagree.

There is no question that employees have the right to file grievances—even multiple grievances. However, there can be little question that the mass filing of grievances here was some kind of a tactic unrelated to the substance of the grievances. The matter grieved about could be resolved with one grievance, if in fact substance was the only object. I do not believe that Little's expression of displeasure at this violated Section 8(a)(1), nor do I find that his statement about the union leadership waking up was an unlawful threat. Rather, I believe it was a genuine expression of concern by one who would be adversely affected should the plant close. In short,

[27] Case 33–CA–10159 et al., 8(b).

[28] Id. at 8(c).

[29] Id. at 8(j).

I cannot conclude that Little harassed and threatened a shop steward as alleged.

Another threat by Little to Shearer is alleged to have occurred on November 27.[30] Shearer testified that Little told him that any controversial signs or buttons could result in suspension since he had been warned on T-shirt day. Little further said that if Shearer had any doubt about a sign or button ''you bring them to me and I will OK them or get them okay or say that they are not permissible.''

Though couched as a separate violation, this no more than one supervisor's implementation of the Respondent's unlawful policy to forbid permissible insignia. Although I conclude that Little violated the Act, his action is subsumed in the Respondent's overall violation concerning the banning of insignia and I need make no further findings on the matter.

Finally, it is alleged as a separate violation that Little violated the Act by prior censorship of employee Ken Weaver.[31] Weaver testified that on or about December 7 he asked Little if he had any problems with any signs on his tool box or any buttons he was wearing. And Little said he did not.

No doubt Little had told employees that he should give prior approval to any questionable insignia they might display; and to the extent this had the effect of limiting permissible messages, such violated the Act. This was an example of enforcement of the Respondent's unlawful policy and was violative of Section 8(a)(1).

g. *Alleged threat by Frank Diem*[32]

When employee Bob Coppenheaver returned from being suspended for two weeks as a result of wearing the Replace Fites T-shirt, he was told to report to a meeting with managers. At this meeting, according to Coppenheaver, Diem gave them (presumably other returning employees who had been suspended) a copy of the Respondent's ''Free Speech'' handout. And in response to a question by Coppenheaver, Diem stated that he could not give specific guidelines as to what would be permissible—that each message displayed by employees would be treated on an incident by incident basis. As with similar statements by Little, this is merely an example of the Respondent's enforcement of an unlawful policy to ban permissible insignia.

The General Counsel and Charging Party refer to this as ''prior restraint'' and ''censorship'' seemingly to distinguish this act from the Respondent's overall policy. In constitutional free speech matters there may be a distinction between prior restraint and subsequent punishment, but I find none of significance here. Both have the effect of prohibiting employees from engaging in protected activity and therefore are violative of the Act. In various ways the Respondent announced its unlawful prohibition of employees displaying messages associated with their Section 7 rights. The statement by Diem was one more instance.

h. *Alleged new work rules*[33]

It is undisputed that in late December and early January Little spoke individually to the employees in his department and told them that henceforth he expected more strict compliance with the 15-minute midmorning and midafternoon breaks and the 20-minute lunch period. He also told them they would have to work to end of their shift and would get only 2-1/2 to 3 minutes to wash up. Little also told employees that they would be responsible for telling their visitors not on company business to leave the department. Little claims to have told all 25 employees in his department. Shearer claims to have investigated this and conclude that he told only 13. Two employees testified they were not told.

It is not particularly material how many employees Little talked to. The fact is that he told employees they were too lax with breaks and before quitting time and he wanted this to stop, as was his undisputed right as a supervisor. Certainly a supervisor can engage in normal supervisory activity without being in violation of the Act. The existence of a labor dispute does not license employees to be lax in their work related duties. Therefore, as a general proposition, I conclude that Little's directives did not amount to ''promulgation of new work rules'' or constitute a violation of Section 8(a)(5) on that basis.

However, some of those employees had worn a ''Replace Fites'' T-shirt on November 24 and to them he said that they had already received a warning; therefore, any breach of the rules he announced would subject them to suspension and for a second offense, discharge. Such clearly signals out individuals who engaged in protected, concerted activity and therefore amounted to an unlawful threat in violation of Section 8(a)(1).

Since there is no evidence that anyone was disciplined for violating any of these rules as a second or third offense, I conclude that there was no violation of Section 8(a)(3). Finally, I conclude that requiring employees to adhere to the contractually established worktime is not a unilateral act violative of Section 8(a)(5).

5. The discharge of Denny Rohrbaugh[34]

Denny Rohrbaugh was a 25-year employee of the Respondent. He was also a committeeman for the Union, with 32 stewards and 450 employees under his jurisdiction. And he was active in the union activity, having been one suspended on T-shirt day.

The discharge resulted from an allegation by Larry Burchell that Rohrbaugh passed union literature on company time on the morning of January 13, 1993. Rohrbaugh denied that he had done so. Burchell was not called as a witness by the Respondent to testify about his alleged observation. Nevertheless, the Respondent contends that it had reasonable cause to believe the allegation from the investigation of this event by second line supervisor Hilton Foore.

Although the Respondent argues here that several factors were considered, including Rohrbaugh's suspension for wearing a Replace Fites T-shirt, counsel stipulated at the unemployment compensation hearing that absent the alleged distribution of union literature on company time Rohrbaugh would not have been discharged.

No doubt the Respondent had a policy against distribution of union literature on working time, and no doubt Rohrbaugh was aware of it since he was present at a meeting on March 9 at which he was warned not to engage in such activity. However, there is also no doubt that the Respondent had tol-

[30] Id. at 8(k).
[31] Id. at 16.
[32] Id. at 8(n), as amended.
[33] Id. at 18.
[34] Id. at 15.

erated solicitation and the distribution of other materials on working time.

On the morning of January 13, during the 20 minutes or so before the beginning of the first shift at 7:24 a.m., Rohrbaugh distributed to oncoming employees two pieces of union literature. Then, according to his generally credible testimony, at about 7:20 a.m. Rohrbaugh started for his department. He was stopped by the third-shift steward and talked briefly about a grievance and then was offered a ride to his work area on the oil cart by a maintenance crew oilier. On the way he was stopped by Steward Barry Gruver (Goover in the transcript). Gruver asked if Rohrbaugh he had an answer concerning a contract question Gruver had inquired about earlier in the week. Rohrbaugh then returned the ''paperwork'' which Gruver had given him. And after Rohrbaugh left, according to Gruver, Burchell approached him and said, ''I want you to know he's in trouble now. I got him on two things. I got him on distributing paperwork and using the oil cart to do it.'' Later, Foore and Burchell asked Gruver to see what Rohrbaugh had given him and he did so, denying that there was included a union flyer with a check mark.

I credit Gruver and Rohrbaugh. But, even if this event occurred exactly as the Respondent argues, it was trivial in the extreme. At most Rohrbaugh gave one employee one flyer a few minutes after the shift was to start. I cannot believe the Respondent would have discharged a 25-year employee for such an insignificant matter. This leads me to conclude that there was a hidden motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). I conclude that Rohrbaugh's union activity (including wearing a ''Replace Fites'' T-shirt) and the union activity in general, was the motivating cause of his discharge. At least these facts are sufficient to establish a prima facie case of discrimination requiring the Respondent to prove that even absent Rohrbaugh's union activity, he would have been discharged. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *Transportation Management Corp. v. NLRB*, 462 U.S. 393 (1983).

According to the Respondent, Burchell observed the exchange and reported to Foore that he had observed Rohrbaugh hand to Gruver what he thought was a piece of union literature. Though Gruver and Rohrbaugh repeatedly denied that it was union literature, Foore testified that he decided to credit Burchell. Rohrbaugh was immediately suspended, and after further investigation, was discharged.

The discharge of Rohrbaugh started with Burchell, yet Burchell was not called to testify under oath and subject to cross-examination about what he actually saw and, more importantly here, what he actually told Foore. The Respondent, in effect, argues that this does not matter. Since the discharge was pursuant to Foore's direction, critical was Foore's knowledge and belief. If he in good faith believed Burchell and disbelieved Rohrbaugh and Gruver, then there is no basis to find that the asserted motive was a pretext.

While the Respondent's argument has some appeal, it is basically sophistic. The Respondent focuses on a second line manager who had no firsthand knowledge of the dischargeable event. His testimony is hearsay and facts allegedly observed are shielded by the Respondent's failure to call, and subject to cross-examination, that management official on whose knowledge the discharge was based. The fact on which the Respondent based its discharge decision is shielded from scrutiny and replaced by an assertion of good faith belief. I conclude that such is insufficient to support the Respondent's burden under *Wright Line*. Good-faith belief that Rohrbaugh passed out union literature must be that of the observer. That is, the Respondent might act if Burchell reasonably believed that Rohrbaugh handed union literature to Gruver. But the best, indeed the only acceptable, evidence of this would be Burchell's testimony. Yet the Respondent did not offer the testimony of Burchell, which suggests that what he in fact told Foore would not be consistent with Foore's assertion. I conclude that the Respondent did not have a reasonable belief that Rohrbaugh distributed union literature on working time and I conclude that he did not in fact do so.

Further, there is no persuasive evidence that absent the union activity Foore would have discharged a 25-year employee for such a minor offense. To the contrary, Foore's testimony convinces me that he decided there were sufficient facts upon which he could make a plausable case for discharging a union activist during the course of an intense labor dispute. Thus, I conclude that the discharge of Rohrbaugh for the reason advanced by Foore was a pretext to disguise his true motive—Rohrbaugh' union activity and the union activity in general. Therefore, the Respondent violated Section 8(a)(3) in suspending Rohrbaugh on January 13 and discharging him on January 20, 1993.

There is no allegation of an unlawful no-distribution rule. Finally, I need not decide whether Rohrbaugh was a victim of disparate treatment since I conclude that he did not in fact distribute union literature on working time, nor did the Respondent reasonably believe he did.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist such activity and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to offer Dennis Rohrbaugh reinstatement and make him whole for any loss of earnings and other benefits he may have lost, computed on a quarterly basis from date of discharge to date of a proper offer of reinstatement, less any net interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). For those employees unlawfully suspended, the Respondent will be ordered to make them whole in compliance with the above formula and expunge from their personnel records any reference to their suspensions.

[Remmended Order omitted from publication.]